SUPREME COURT, U.S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-355

THE PULITZER PUBLISHING COMPANY,
Petitioner,

v.

MERNA MacBRIDE LAZIER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri

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To the Supreme Court of Missouri

The Petitioner, The Pulitzer Publishing Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Missouri entered in this proceeding on June 14, 1971.

OPINION BELOW

The opinion of the Supreme Court of Missouri, reported at 467 S.W.2d 902 (Mo., 1971), appears in the Appendix hereto. The jury rendered a verdict for the Petitioner in the Circuit Court for the City of St. Louis, Missouri, and a judgment for Petitioner was entered. This judgment was reversed by the Missouri Supreme Court on appeal.

JURISDICTION

The judgment of the Missouri Supreme Court was entered on May 10, 1971. A timely petition for rehearing or in the alternative for transfer to the Missouri Supreme Court en banc was denied on June 14, 1971, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is envoked under 28 U.S.C., § 1257(3).

QUESTIONS PRESENTED

1. Is Respondent, whose by-line appeared for twelve years in a newspaper with a national circulation and who alleged in her petition and proved at trial to have an international reputation as an author of food articles, a "public figure" requiring the proof of "actual malice" as defined by the evolved **New York Times** doctrine in a state defamation action?

2. Is a letter written by a newspaper editor in response to written inquiries by a number of readers of the newspaper concerning the dropping of Respondent's by-line from a national newspaper a matter of "public or general interest" thus requiring Respondent to prove "actual malice" as defined by the evolved **New York Times** doctrine in a state defamation action based upon such letter?

3. If the matter communicated is of legitimate interest to the publisher or writer and to the person or persons to whom communicated, but not necessarily to large numbers of the public, does the First Amendment nevertheless require the "actual malice" test of **New York Times** be applied in a state defamation action based on said publication?

4. In a private or "commercial" libel action where the matter communicated was of legitimate interest to the writer and to the person to whom it was communicated,

may the Respondent recover damages in a state defamation action based on said communication by merely showing the writer made the statement "without knowing whether it was true or false," or does the First Amendment require Respondent prove the false statement was made at least negligently?

5. In a private or "commercial" libel action where the matter communicated was of legitimate interest to the writer and to the person to whom it was communicated, may the Respondent recover punitive damages in addition to actual damages when Respondent only proves negligence and not "actual malice" as defined by the **New York Times** doctrine?

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

This case involves an action for libel brought by an employee against her employer, a newspaper (Tr. pp. 1-4). Petitioner is the publisher of a nationally known and nationally circulated newspaper, the St. Louis Post-Dispatch (Tr. p. 1). The Respondent, first as a free lance writer and then as an employee, works for the Petitioner newspaper in preparing an illustrated food article known as "My Favorite Dish" (Tr. pp. 1, 5). For approximately 12 years the food feature appeared under Respondent's by-line (Tr. pp, 5, 6). In February, 1965, Petitioner's management decided to ultimately eliminate the food article because of new technical advances in color productions and as a first step Respondent's by-line was dropped from the feature (Tr. pp. 147, 155). Numerous letters of inquiry were received from readers of the news-

paper concerning the dropping of Respondent's by-line (Tr. pp. 146, 169). Two of Petitioner's editors responded to two of the inquiries because one had a self-addressed, stamped envelope enclosed (Tr. pp. 145, 146) and the other was personally addressed to Editor Brandsted and came from a librarian (Tr. p. 168). The letters of inquiry and the responses are set out verbatim in the opinion of the Missouri Supreme Court (App. A-2, A-3, A-6, A-7). The reply letters, which are the basis for Respondent's libel suit, basically indicated that Respondent was not the author and only assisted in gathering the recipes and arranging for the picture taking. Both of the editors who wrote the letters testified that at the time they made the statements they honestly believed them to be true (Tr. pp. 142-144, 165-167). One of the editors had never met the Respondent in the twelve years she was an employee (Tr. p. 141) and the other testified he only saw her in the office once (Tr. p. 165). However, for the purposes of this writ the statements contained in the letters of reply may be presumed to be false.

Respondent's petition for libel alleges that "she has established an international and national reputation as an author and writer of such [food] articles and procuring such recipes" (Tr. p. 2).

Petitioner properly raised the Constitutional issues now being raised in this writ by specifically stating in its answer that the alleged libelous statements were constitutionally privileged by the First Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment (Tr. p. 11). Petitioner's answer specifically states that the grounds for raising the constitutional privilege was that the Respondent was and is a "public figure", involved in a matter of "**public interest**" (Tr. p. 10). Petitioner again raised the constitutional issues in a motion for summary judgment on the grounds that the statements complained of involved

a matter of legitimate public interest and Respondent was a public figure, but said motion was overruled. At the trial Petitioner filed a motion for directed verdict on the grounds that Respondent-Plaintiff had failed to overcome the constitutional privilege (Tr. p. 138). Petitioner also raised the constitutional issues by requesting instructions to the jury which were consistent with this Court's decisions in cases involving constitutional privilege but the instructions were denied (Tr. pp. 193-195).

The jury returned a verdict for the Defendant-Petitioner and the Respondent appealed to the Supreme Court of Missouri. The Missouri Supreme Court reversed the jury verdict for Petitioner and remanded the case for a second trial in which the lower court has been specifically instructed that the statements complained of are not constitutionally privileged and the "actual malice" test as defined in **New York Times Co. v. Sullivan**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) is **not** to be applied. Petitioner specifically raised the constitutional privilege issue in its brief and argument before the Supreme Court of Missouri specifically noting that Respondent was a "public figure" and that she was involved in a matter of "public interest." (See part IV, B of Petitioner's brief deposited with the Court.)

The Missouri Supreme Court in its opinion found that Respondent's by-line appeared in a nationally circulated newspaper for a 12 year period (App. p. A-2); that Respondent's "profession or business, according to her evidence, was that of an author and authority on cooking" (App. p. A-8); that the dropping of Respondent's by-line from a nationally known newspaper resulted in letters of inquiry from readers (App. p. A-2); that one of the letters stated that Respondent "is one of St. Louis' authorities on Gourmet Cooking. Her ability is recognized by professional chefs as well as amateur cooks, witness the overwhelming popularity of her cooking classes" (App.

p. A-6); and that Petitioner had held Respondent out to its reading public as the author and the letters from its editors came close to making her out a fraud to the reading public (App. p. A-8).

Furthermore, the uncontroverted testimony in the trial showed that Respondent's reputation in cooking circles was established in France, Scotland, England, Germany, India, Australia, and New Zealand (Tr. pp. 86-87). Respondent stated that as part of her work she traveled world-wide (Tr. pp. 26, 27, 86, 87), was an honorary member of Chef de Cuisine (Tr. p. 27), and was a member of the American Culinary Federation (Tr. p. 28). Respondent taught cooking classes locally at several schools (Tr. p. 88) and was editor of a local cuisine magazine (Tr. p. 88). This evidence was specifically noted to the Missouri Supreme Court in Petitioner's brief (Br. pp. 36-37).

The Supreme Court of Missouri in ruling on the constitutional issues raised by Petitioner intentionally omitted any discussion of "public interest" and held that **"by no stretch of the imagination can plaintiff be considered a public figure so widely known that the rule as to public officials should apply to her in this libel action"** [emphasis added] (App. p. A-11).

Consequently, the Supreme Court of Missouri directed on retrial that the jury be instructed as set out in "Missouri Approved Instructions" (M.A.I.) 23.06. This Instruction by the Missouri Supreme Court's own rule has no application in cases involving the constitutional privilege first enunciated in **New York Times Co. v. Sullivan,** supra. The Instruction and related pertinent comments as approved by the Missouri Supreme Court are set out in the Appendix page A-13.

Petitioner filed a motion for rehearing or in the alternative for a transfer to the Court en banc in which it again

raised the constitutional privilege and again extensively briefed this Court's decisions involving the constitutional privilege. Petitioner anticipated this Court's decision in **Rosenbloom v. Metromedia, Inc.**, 91 S.Ct. 1811 (1971), and argued in both its original brief and in its motion for rehearing that "public interest" was the true basis for this Court's decisions in this area (See part IV, B of Petitioner's brief deposited with the Court). While Petitioner's motion for rehearing was pending before the Missouri Supreme Court this Court decided the case of **Rosenbloom v. Metromedia, Inc.**, 91 S.Ct. 1811 (1971). Petitioner brought that case to the attention of the Supreme Court of Missouri while its motion was still pending but Petitioner's motion for rehearing was subsequently denied.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court of Missouri Has Refused to Follow and Apply the Decisions of the Supreme Court of the United States Commencing With *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) Setting Forth First Amendment Standards in State Defamation Cases.

Newspapers continue to be plagued by libel suits, and state courts, while claiming to recognize the existence of this Court's decision in **New York Times Co. v. Sullivan**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), consistently find that it does not apply on the facts. See **Ocala Star-Banner Company v. Damron**, 401 U.S. 295, 91 S.Ct. 628, 28 L.Ed.2d 57 (1971); **Monitor Patriot Co. v. Roy**, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971); **Greenbelt Cooperative Pub. Assn. v. Bresler**, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970); **St. Amant v. Thompson**, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). The Missouri Supreme Court decision in this case is another example. Petitioner defended a $350,000.00 libel suit and won a jury verdict on an instruction which at least approached the **New York Times** standard. The Missouri Supreme Court has now reversed this jury verdict and has told Petitioner it must now bear the expense of a second trial in which the trial court has been specifically instructed that the "actual malice" test as defined in the **New York Times** case is **not** applicable. Petitioner presented and argued this Court's decisions applying the **New York Times** test of "actual malice." The Missouri Supreme Court found that Respondent-Plaintiff: (1) plead and proved that she had a "national and international reputation as an expert in fine cooking" (App. p. A-10); (2) that she was an "author and authority on cooking" (App. p. A-8); (3) that for

twelve years her by-line appeared on a weekly food article in Petitioner's national newspaper (App. p. A-2); (4) that the dropping of her by-line resulted in a number of letters from readers, two of which are involved in this lawsuit (App. p. A-2); and (5) that Petitioner had held Respondent out to its reading public as the author and the letters from its editors came close to making her out a fraud to the reading public (App. p. A-8). Nevertheless, the Supreme Court of Missouri found that "by no stretch of the imagination can plaintiff be considered a public figure **so widely known** that the rule as to public officials should apply to her in this libel action" (emphasis added) (App. p. A-11). Petitioner filed a motion for rehearing and while the motion was pending this Court decided the case of **Rosenbloom v. Metromedia, Inc.**, 91 S.Ct. 1811 (1971). Petitioner brought that case to the attention of the Supreme Court of Missouri but Petitioner's motion for rehearing was subsequently denied. Furthermore, even prior to **Metromedia**, Petitioner extensively briefed and argued in its appeal before The Missouri Supreme Court that the constitutional privilege applied to any matter of "public interest." (See Petitioner's brief, part IV, B, p. 28). Petitioner had noted to the Court that the school teacher who wrote a letter to the newspaper editor in **Pickering v. Board of Education**, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) was less known than the Respondent in this case. The Missouri Supreme Court refused to even give lip service to this argument in its opinion or even mention **Metromedia** in its denial of Petitioner's motion for rehearing. We have emphasized this point in order to make it clear to this Court that the Missouri Supreme Court did not merely overlook this argument, but intentionally ignored it.

Like the petitioner in **Time, Inc. v. Pape**, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971), this Petitioner seeks this writ after having thus far avoided a large judgment

against it. And like the petitioner in **Time, Inc. v. Pape,** this Petitioner is on the horns of the dilemma. It may forego the expense of seeking a writ of certiorari at this point and run the gauntlet of a second trial in which damages are permitted under an instruction whereby Respondent need not even prove the Petitioner was negligent (see page 14 of this writ). After losing in the second trial it may make a futilous appeal to the Missouri Supreme Court again. At that point Petitioner would be forced to seek a writ of certiorari, thus winding up right back where it is now. Even if Petitioner should win a second jury trial Petitioner still loses because the "bad" decision of the Missouri Supreme Court stands. Petitioner, as the largest newspaper in Missouri, and other Missouri newspapers are continuously defending libel suits. Petitioner is presently defending other libel suits in the lower courts of Missouri in which this "bad" decision of the Missouri Supreme Court will undoubtedly be used against it and others as a basis for future denials of the **New York Times** rule. Whereas, if this Court rules that the **New York Times** doctrine is applicable this Court as in similar prior cases could terminate this litigation by reversing the Supreme Court of Missouri and reinstating the jury verdict for Petitioner. **Time, Inc. v. Pape**, supra, 91 S.Ct. at 637; **New York Times Co. v. Sullivan**, supra, 376 U.S., at 284-285, 84 S.Ct. at 728.

The narrow questions presented by this case concerning the limitations the First Amendment imposes on state defamation actions are:

1. Is Respondent, whose by-line appeared for twelve years in a newspaper with a national circulation and who alleged in her petition and proved at trial to have an international reputation as an author of food articles, a "public figure" requiring the proof of "actual malice" as defined by the evolved **New York Times** doctrine in a state defamation action?

Respondent is well within the established and more restricted "public figure" concept as delineated in **Curtis Pub. Co. v. Butts,** 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (former football coach allegedly involved in football fix). Also, the former county recreation area supervisor in **Rosenblatt v. Baer,** 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966) and the school teacher in **Pickering v. Board of Education,** 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968) were no more "public" or "widely known" than an internationally known food authority and writer whose by-line has been dropped from a national newspaper.

2. Is a letter written by a newspaper editor in response to written inquiries by a number of readers of the newspaper concerning the dropping of Respondent's by-line from a national newspaper a matter of "public or general interest" thus requiring Respondent to prove "actual malice" as defined by the evolved **New York Times** doctrine in a state defamation action based upon such letter?

In the case at bar the dropping of Respondent's by-line from a national newspaper resulted in letters of inquiry from the readers of the newspaper to its editors. Petitioner's editor stated that he felt he had an obligation to answer the inquiry since a self-addressed, stamped envelope was enclosed (Tr. pp. 145-146). Do not the letters of inquiry from readers of the newspaper conclusively show that Respondent was involved in a matter of sufficient "public interest" to invoke the constitutional privilege? Surely these letters of inquiry demonstrate that Respondent was involved in a matter of **sufficient** "public interest" to warrant the constitutional privilege in light of this Court's decision in **Rosenbloom v. Metromedia, Inc.,** 91 S.Ct. 1811 (1971) and the older cases of **Pickering v. Board of Education,** 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968) and **Time, Inc. v. Hill,** 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

Furthermore, the Respondent is not merely maintaining that she has been subject to "ridicule" by friends but rather that her professional, **public** reputation as an international and national authority on cooking has been seriously damaged. See Respondent's petition (Tr. p. 4) and the letters from the readers (App. p. A-2, A-6). Respondent chose a libel instruction contending that the statements "tended to deprive plaintiff of the benefit of **public** confidence and damaged plaintiff's reputation" (emphasis added) (Instruction No. 2, para. 2, Tr. p. 197-A). If a person is widely enough known to have a substantial public reputation and to have developed "public confidence" which she now claims to have been damaged, is she not sufficiently "public" that the First Amendment requires proof of "actual malice," at least as to statements concerning the public aspects of her life! The Missouri Supreme Court apparently did not see the anomaly in claiming substantial actual damages to an international reputation as a food authority and its holding that Respondent is not a "public figure" and was not involved in a matter of legitimate "public interest."

II. This Case Presents an Opportunity to This Court to Further Delineate the Developing Principles Involving State Libel Cases and the First Amendment, Particularly the Questions Left Unresolved Since *Rosenbloom v. Metromedia, Inc.*, 91 S.Ct. 1811 (1971).

Petitioner submits that if this Court grants this writ it may decide this case on either of the two narrow issues presented above. However, if the Court chooses to do so it might expand the **New York Times** doctrine to all libel actions which are qualifiedly privileged under traditional common law concepts. See Prosser, Torts § 110, at 805-811 (3rd ed. 1964); Restatement, Torts §§ 594-596 (1938). This issue can be framed as follows:

3. If the matter communicated is of legitimate interest to the publisher or writer and to the person or persons to whom communicated, but not necessarily to large numbers of the general public, does the First Amendment nevertheless require the "actual malice" test of **New York Times** be applied in a state defamation action based on said publication?

This case could be decided on this broader basis since it involves an employer (Petitioner) and employee (Respondent) and an inquiry by a reader which involved the business interests of Petitioner and the employee. Defamatory statements made in the ordinary course of commercial activity have traditionally been privileged under the common law and this Court has already adopted by analogy the "actual malice" test of **New York Times** in at least one instance involving employer and employees. **Linn v. United Plant Guard Workers**, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). Surely, if the First Amendment is to have any meaning, it should have the same degree of application to legitimate publications between parties with a common interest in the matters being communicated as it does to matters of "general or public interest." All parties and the Missouri Supreme Court agree that the case is one of qualified privilege under traditional common law rules in Missouri and elsewhere (App. p. A-8). The only question is what standard of conduct should be required. If the publisher or writer believes what he is saying is true and has no reason to doubt the truth, he should not then have to respond for such limited publication.

Again, if this Court chooses it may consider this case in its broader aspects and consider whether:

4. In a private or "commercial" libel action where the matter communicated was of legitimate interest to the writer and to the person to whom it was communicated,

may the Respondent recover damages in a state defamation action based on said communication by merely showing the writer made the statement "without knowing whether it was true or false," or does the First Amendment require Respondent prove the false statement was made at least negligently?

Missouri has adopted a set of "Approved Instructions" for most civil actions including some libel cases. However, there is no Missouri Approved Instruction (M.A.I.) for libel cases falling within the **New York Times** rule. The Missouri Supreme Court in its decision has directed that M.A.I. 23.06 must be given in this case. M.A.I. 23.06 by Missouri's own rules has no application in cases involving constitutional privilege. See Committee's Comments to M.A.I. 23.06 (App. p. A-13).

The Missouri Approved Instruction 23.06 not only does not measure up to the **New York Times** standard, but Petitioner further submits that it does not even require a showing of ordinary "negligence." There is no provision in the instruction for the determination of whether or not Petitioner failed to use "reasonable care or diligence" in determining the truth or falsity of the statement made, or that a reasonable man "should have known" it was false. While the instruction purports to be less than strict liability, upon closer observation it is nothing more than the traditional strict liability arising from proof of falsity which has consistently been struck down by this Court. **New York Times Co. v. Sullivan**, supra, 376 U.S. at 271-272, 84 S.Ct. at 721; **Curtis Pub. Co. v. Butts**, supra, 388 U.S. at 152, 87 S.Ct. at 1990. In this type of instruction, where there is no determination of lack of reasonable care, the honest and reasonable mistake is punished. The question is whether or not the First Amendment guarantee of free speech demands more "breathing space" even for private individuals discussing or communicating nonpolitical

matters. See **Time, Inc. v. Hill**, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

Finally, even assuming a state is free to set a standard of negligence in private or commercial libel actions, the Court may reach the issue of whether or not the First Amendment prohibits the imposition of punitive damages in addition to actual damages for mere negligent misstatements. The issue is as follows:

5. In a private or "commercial" libel action where the matter communicated was of legitimate interest to the writer and to the person to whom it was communicated, may the Respondent recover punitive damages in addition to actual damages when Respondent only proves negligence and not "actual malice" as defined by the **New York Times** doctrine?

Mr. Justice Harlan and Mr. Justice Marshall in their opinions in **Rosenbloom v. Metromedia, Inc.**, stated that they favor a negligence standard in private libels with recovery limited to actual damages.

In **Rosenbloom v. Metromedia, Inc.**, Mr. Justice White excellently stated the various positions of the members of the Court in the privilege area and succinctly stated the rules which would obtain the support of a majority of the Court.

> "[I]t would seem that at least five members of the Court would support each of the following rules:
>
> "For public officers and public figures to recover for damage to their reputations for libelous falsehoods, they must prove either knowing or reckless disregard of the truth. All other plaintiffs must prove at least negligent falsehood, but if the publication about them was in an area of legitimate public interest, then they too must prove deliberate or reckless error. In all actions for libel or slander, actual damages must be

proved, and awards of punitive damages will be strictly limited." **Rosenbloom v. Metromedia, Inc.**, 91 S.Ct. 1811, 1827 (1971).

The Missouri Supreme Court opinion in this case and M.A.I. 23.06 are contrary to all of the above rules.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Missouri Supreme Court.

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